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SUBJECT: EU MOVES TOWARD LEGISLATION ON RETENTION
OF TELECOMS DATA

REF: USEU BRUSSELS 3743

SUMMARY

¶11. The UK Presidency in the December 2 meeting of EU Justice and Home Affairs ministers (JHA Council) secured a majority agreement on a compromise to approximate member states' legislation on the retention of telecom data. Ministers agreed to require the storage of traffic information for a minimum of 6 to 24 months, but did not set a maximum time period, thereby accommodating member states with legislation on longer storage. UK Home Secretary/JHA Chair Charles Clarke was confident the

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package would win the necessary backing of the EP next week. Full text of Council conclusions has been transmitted to EUR/ERA. End summary.

RETENTION OF TELECOM DATA

¶12. The EU JHA Council on December 2 agreed on proposals for submission to the European Parliament on a draft Directive requiring telecommunications companies to retain phone and Internet traffic data for a minimum period of 2 years and 6 months respectively. The draft is intended to facilitate judicial cooperation in criminal matters by approximating member states' legislation on the retention of data. The text covers traffic and location data generated by telephony, SMS and Internet, but does not cover the content of the calls. Up to 15 member states currently do not have mandatory rules on the retention of data, including the UK, which has a voluntary code.

¶13. The British Presidency, which set the adoption of EU legislation setting a data retention obligation as a key objective of its six-month term, watered down its initial ambitions (REFTEL) to secure a qualified-majority agreement on revised measures in the Council and meet the EP's concerns. Key elements of the compromise package are as follows:

- Retention periods: member states will ensure to retain transmission data for periods of not less than 6 months (internet) and for a maximum of two years (telephony) from the date of the communication;
- Internet data: the Council is in favor of an obligation to retain data on Internet access, Internet e-mail and Internet telephony;
- Unsuccessful calls: the Council is in favor of including the retention of data in relation to unsuccessful call attempts where the data are "generated or processed, and stored (telephony data) or logged (Internet data) by providers of publicly available electronic communications services or of a public communications network within their jurisdiction in the process of supplying the communication services concerned." The Directive would not require the retention of data in relation to unconnected calls;
- Serious criminal offences: A reference to serious crime was included in the draft, as defined by each member state in its national legislation. The EP is pushing for access by law enforcement agencies to the data to be restricted to serious crime -- the 32 offences listed in the EU legislation on the European Arrest Warrant. The Council compromise specifies that member states "shall have due regard" to that list and crime involving telecommunication.

14. Ministers also confirmed their decision to leave it up to each member state to compensate their national telecom providers for increased costs if they so wish.

15. The Council compromise was resisted by Ireland, Slovenia and Slovakia, who insisted the matter should be dealt with under inter-governmental cooperation, thus objecting to the involvement of the EP. Irish Justice minister McDowell reiterated his threat to take the issue to the EU Court of Justice.

16. With the Commission firmly backing the Council's compromise and based on consultations with key EP leaders, the Presidency will now seek the necessary approval of Parliament and reach a "first reading deal" under the co-decision procedure by the year's end. UK Home Secretary/Council Chair Charles Clarke was confident Parliament would agree the package in Strasbourg next week. This "will make a very clear statement that all of the institutions of the EU, the Council, the Commission and the Parliament stand firm in the fight against terrorism and defeat of organized crime," Clarke stated. Spanish Justice Minister Juan Fernando Lopez, noting that data retention had been crucial in investigating the March 2004 attacks in Madrid, said: "A consensus that allows for one step forward is better than nothing."

OTHER JUSTICE ITEMS

17. In its discussions of other "justice items," the Council:

- Reached a "general approach" on a draft Regulation aimed at simplifying and reducing the costs of litigation in cross-border cases concerning uncontested money claims and permitting the free circulation of European orders for payment throughout all member states;
- Reached agreement on a number of specific issues under a draft Regulation establishing a European procedure simplifying litigation on small claims in cross-border cases;
- Reached a "common understanding" -- subject to further clarification of some issues -- on a draft Directive concerning mediation in civil and commercial matters;
- Noted progress on a Framework Decision on procedural rights in criminal proceedings throughout the EU;
- Remained split on a Framework Decision on the European Evidence Warrant (EEW) for obtaining objects, documents and data for use in proceedings in criminal matters. The aim is to establish a mechanism to facilitate the obtaining of evidence in cross-border cases based on mutual recognition principles.

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